ARKANSAS COURT OF APPEALS
NOT DESIGNED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION II

CACR 07-608

STEPHEN HINDS
APPELLANT

February 27, 2008

APPEAL FROM THE CIRCUIT COURT OF FAULKNER COUNTY
[NO. CR-05-1280]

V.

HONORABLE DAVID LEE REYNOLDS, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

A jury in Faulkner County found appellant, Stephen W. Hinds, guilty of sexual assault in the fourth degree, a misdemeanor, for which he was fined $1,000 and committed to the county detention facility for a period of 180 days. On appeal, appellant argues that the trial court erred by excluding the testimony of a child witness, asserts that the prosecutor made inappropriate comments during his closing arguments, and he challenges the sufficiency of the evidence. These contentions present no basis for reversal. Therefore, we affirm.

The lone witness for the State was the victim, BB, who was twelve years old on June 11, 2005. According to BB, she spent that day at the ballpark in Greenbrier with her mother and brother, but sometime late in the afternoon she went over to appellant's home that was within walking distance from the park. BB's mother was the best friend of appellant's wife, Paula, and BB

had known appellant for a year since he and Paula married. On occasion, BB and her brother, as well as her mother, stayed with Paula during her mother's illness with cancer and those times when BB's parents were separated. BB, her mother, and her brother had just moved back home the day before.

When BB arrived that afternoon, appellant, Paula, and Paula's son and daughter, fifteen-year-old JR and five-year-old AW, had just gotten home from the lake. BB recalled that she and AW played in AW's room, that Paula had styled her (BB's) hair, and that they had cooked out. She and AW played on the trampoline after supper. When it was dark, BB realized that she had left her notebook outside, and she went to get it. Appellant was smoking a cigarette by his boat, which BB said was parked under a carport by a shed. BB said that appellant called her over and that she climbed onto the boat. She said she was playing with the depth finder when appellant tickled her, placed his hand underneath her shirt, and felt her breast. She testified that he told her to go into the shed with him to work on a body-building machine. BB stated that while inside the shed appellant lifted up her shirt and put his mouth on her breast, and then kissed her.

Afterwards, BB said that she and appellant shot basketball and were outside when Paula's brother arrived. She went back inside the house and into a bedroom with Paula and AW. She called her mother and then watched TV with JR for thirty minutes until her mother picked her up. BB said that she told no one what had happened, including her mother. She explained that she did not know how anyone would react and that she did not want to upset her mother because of her illness. She told her aunt the next day.

Paula gave testimony for the defense recounting where everyone in the household was during the afternoon and evening. She said that JR was with BB at all times and that they all were outside right after supper when her brother arrived. Paula testified that there was no opportunity for

appellant and BB to have been alone outside after supper and before the arrival of her brother. Paula further testified that JR's things were kept in the shed, that it was always padlocked, and that JR had the only key. She also recalled that the boat was not by the shed but was still hooked up to appellant's truck from the trip to the lake. She maintained that appellant was not capable of doing what BB described.

JR testified that he had fallen asleep on the couch when they got home from the lake and that BB was there when he woke up. He said that BB was not out of his presence after he awakened. His testimony was that he and BB went outside after supper and that his uncle and cousin pulled into the driveway moments later. His mother and appellant then came outside. He said that the boat was still attached to appellant's truck and parked by the carport. JR stated that BB got onto the boat and that appellant poked BB in the side and told her to get off the boat because she was tinkering with the trolling motor. He said that he and BB then went inside and watched a video. JR also testified that BB never went into the shed because it was locked and he had the only key.

Appellant also took the witness stand. He testified that when they got home from the lake he relaxed for an hour or so in the living room while JR slept on the couch. He then grilled hamburgers, and he remembered that BB was not hungry and did not eat. He said that BB asked him if he liked her hair after Paula had styled it, and he told her that it looked fine. After eating, he took his plate into the kitchen and that is when he said Paula's brother pulled into the driveway. Appellant said that he went outside and saw that BB was lying on his boat. He also testified that the boat was still hooked up to his truck and was parked up front and not back at the shed. He testified that while he was cleaning the grill BB was "pushing my button." She asked him what the trolling motor and "back" did. He said that he explained those things to her and that he poked her in the side and "told her to get off my damn boat."

Appellant also stated that he was never alone in the home with her that day and that someone else was always present when they were outside. He denied that he had gone into the shed with her.

Although listed as his final issue, double jeopardy considerations require us to first address appellant's argument that the evidence is not sufficient to support the verdict. *Talbert v. State,* 357 Ark. 262, ___ S.W.3d ___ (2006). On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict. *Pinder v. State,* 357 Ark. 275, 166 S.W.3d 49 (2004). A conviction will be affirmed if there is substantial evidence to support it. *Talbert v. State, supra.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Arnett v. State,* 353 Ark. 165, 122 S.W.3d 484 (2003).

A person commits sexual assault in the fourth degree if he engages in sexual contact with another person who is less than sixteen years old and not his spouse. Ark. Code Ann. § 5-14-127(a)(2) & (b)(2) (Supp. 2005). The term "sexual contact" includes any act of sexual gratification involving the touching of a female breast. Ark. Code Ann. § 5-14-101(9) (Supp. 2005).

As his argument, appellant pits his testimony and that of his witnesses against the testimony of BB. This argument is unconvincing because it is the jury's place to judge the credibility of the witnesses. *Arnett v. State, supra.* Our law is settled that a victim's uncorroborated testimony is sufficient to support a sex-based conviction, so long as the statutory elements of the offense are satisfied. *Pinder v. State, supra.* In light of BB's testimony, which the jury chose to believe, we cannot say there is no substantial evidence to support the guilty verdict.

The next issue we address is the contention that the trial court erred by excluding the testimony of a witness, AW, Paula's then six-year-old daughter. On the morning of trial, the State moved in limine to exclude AW's proposed testimony that BB had told her that the accusation of

sexual misconduct was a lie. The State asserted that it had been notified of the child's proposed testimony only the day before trial, and that it was taken by surprise and had not had time to investigate the circumstances under which BB's alleged statement was made. The trial court heard a proffer of the child's testimony. Afterwards, the trial court decided to exclude the testimony, ruling that it was hearsay and that the child was not competent to testify.

On appeal, appellant challenges only the ruling regarding the competency of the child as a witness. No argument is made concerning the trial court's alternative ruling that the testimony was inadmissible hearsay. Even if we agreed with appellant's competency argument, that would not settle the question of whether the child's testimony was otherwise admissible in light of the trial court's additional ruling that the testimony was hearsay. When a party appealing from a ruling leaves an alternative, independent ground for the ruling unchallenged, the trial court's ruling must be affirmed. *Pugh v. State*, 351 Ark. 5, 89 S.W.3d 909 (2002). Stated another way, we will not reverse where a trial court bases its ruling on more than one independent ground, but the appellant challenges only one of those grounds. *Avery v. State,* 93 Ark. App. 112, 217 S.W.3d 162 (2005).

Appellant's remaining two issues concern remarks made by the prosecutor during closing argument – one during closing in the guilt phase of trial, and another made during argument in the sentencing phase of trial. First, during his closing argument in the guilt phase, the prosecutor commented that Paula, like a battered woman, was in denial over her husband's transgression. Appellant argues that the prosecutor's remarks were improper. The problem with appellant's argument, however, is that he made no objection to the prosecutor's remark at trial. Although he did raise this issue in a motion for a new trial, an objection at that juncture comes too late. Our supreme court has repeatedly observed that an objection first made in a motion for new trial is untimely. *Donovan v. State,* 95 Ark. App. 378, 237 S.W.3d 484 (2006) (quoting *Daniel v. Lee,* 350

Ark. 466, 91 S.W.3d 464 (2002)). *See also Hodges v. State,* 27 Ark. App. 154, 767 S.W.3d 541 (1989).

In his closing argument at sentencing, appellant's counsel asked for the jury not to impose either a fine or jail sentence. The following occurred during the prosecutor's rebuttal closing argument:

> PROSECUTOR: Ladies and gentlemen, it would be a travesty of justice for you to go back and find a sentence of no fine and no imprisonment. That is not the kind of message that we need to send to sexual predators out there.
>
> DEFENSE COUNSEL: You Honor, I'm going to object to this.
>
> THE COURT: The objection is sustained.
>
> PROSECUTOR: I'm just going to ask what I ask you before which is a six month imprisonment and a thousand dollar fine.

Appellant contends that he should have been granted a new trial because the prosecutor's statements concerned facts outside the record. We find nothing objectionable in the prosecutor's statements. A prosecutor is allowed to convey a "send a message" theme in closing argument. *Tryon v. State,* ___ Ark. ___, ___ S.W.3d ___ (Sept. 27, 2007). A prosecutor is also permitted to argue even for the maximum punishment. *Id.* We affirm on this point.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.